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No. 78-1200

In the Supreme Court of the United States

OCTOBER TERM, 1978

ANTHONY T. SANTOS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-7) is reported at 588 F. 2d 1300.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1979. The petition for a writ of certiorari was filed on February 2, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the substitution of one district judge for another, after the jury had begun to deliberate, violated petitioners' constitutional right to a trial by jury and requires reversal of their convictions, even though petitioners did not object to the substitution and have not shown any prejudice resulting from it.

STATEMENT

After a jury trial in the District Court of Guam, petitioners were convicted of depriving certain inhabitants of the Territory of Guam of their civil rights, in violation of 18 U.S.C. 242 (Pet. App. A-1).[1] The evidence at trial showed that petitioners, correctional officers and supervisors at the Guam Territorial Prison, assaulted and seriously injured eight prisoners on February 29, 1976, after the prisoners had engaged in a brief, peaceful demonstration to protest their grievances (Pet. App. A-1 to A-2).

The indictment was returned on February 4, 1977. Judge Cristobal C. Duenas, the judge regularly assigned to the District of Guam, heard and decided petitioners' pretrial motions. However, Judge Duenas was absent when trial commenced on June 29, 1977, and accordingly Judge Gordon Thompson, Jr., of the United States District Court for the Southern District of California presided over petitioners' trial. After both sides had presented their evidence and delivered closing arguments, and after the jury had deliberated for several hours, Judge Duenas returned and took control of the case (IX Tr. 2308).[2] Petitioners voiced no objection to this substitution. Judge Thompson then left Guam.

Judge Duenas excused the jury in the evenings, reconvened court in the mornings, received the verdicts, and entered orders of discharge and orders specifying the conditions of release following the verdicts (IX Tr. 2303; X Tr. 2337). He also sentenced petitioners (X Tr. 2338-2367). Judge Duenas' only ruling during trial that required the exercise of discretion was his decision not to

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[1]The sentences imposed on petitioners are set forth at X Tr. 2359-2367.

[2]Judge Duenas did not certify that he had become familiar with the record in the case. See Fed. R. Crim. P. 25(a).

sequester the jury, and this decision was made upon the advice of Judge Thompson and without the objection of any party (IX Tr. 2309-2310).

The court of appeals affirmed. Although the court agreed that the substitution of Judge Duenas for Judge Thompson after the jury had begun its deliberations was not in strict compliance with Fed. R. Crim. P. 25(a), it concluded that the error was harmless in light of petitioners' failure to claim that they suffered any prejudice and the court's independent determination that the record revealed no prejudice (Pet. App. A-7).

ARGUMENT

Petitioners do not contend that Judge Duenas' failure to follow the procedures established by Rule 25(a) entitles them to a new trial. Rather, they apparently argue in this Court that the substitution of judges at any stage of a criminal trial is *per se* unconstitutional and can never be harmless error.

There is little support for the proposition that a defendant has a non-waivable federal constitutional right to have the same judge preside over the jury at every stage of his criminal trial, from voir dire to verdict, much less that every violation of that "right" requires the reversal of a conviction. *Freeman* v. *United States*, 227 F. 732 (2d Cir. 1915), the only federal case cited by petitioners in which a criminal conviction was set aside because of a substitution of judges, has since been questioned by the Second Circuit (see *United States* v. *LaSorsa*, 480 F. 2d 522, 531, cert. denied, 414 U.S. 855 (1973)), and its holding is suspect because it rested in large part on the assumption, subsequently repudiated in *Patton* v. *United States*, 281 U.S. 276 (1930), that a defendant could not waive his right to a jury trial (see 227 F. at 744). See *United States* v. *Boswell*, 565 F. 2d 1338, 1341-1342 (5th Cir. 1978), cert. denied, No. 77-1466 (Oct. 2, 1978); *Simons* v. *United States*, 119 F. 2d 539, 543-544 (9th Cir.), cert. denied, 314 U.S. 616 (1941).

Moreover, *Freeman* is distinguishable on its facts. There, a new trial judge was substituted after the government had presented 106 witnesses and before the defense had begun to put on its evidence. The court of appeals noted that the new judge had not heard all the evidence that the jury had heard and had even told the jury that he was unable to furnish necessary guidance concerning the testimony of witnesses who had appeared prior to his taking the bench (227 F. at 759).[3]

To the extent that the right to a jury trial includes the right to have the same judge preside over the jury, it rests on the need to have a judge familiar enough with the case "to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence." *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 13-14 (1899). Unless the substitution of a judge inhibits in some way the exercise of the judge's duty relative to the jury's function, there is no basis to conclude that any aspect of the right to a jury trial has been impaired. Here, the perfunctory actions taken by Judge Duenas at the final stages of the trial were not of that kind. Except on those occasions when the jury requires further guidance during its deliberations, a contingency that did not arise in this case, a judge is not needed at all after the jury has retired to consider its verdict.[4] The functions actually

[3]The other cases cited by petitioners are not on point. *Randel* v. *Beto*, 354 F. 2d 496 (5th Cir. 1965), cert. denied, 387 U.S. 935 (1967), held only that the district court erred in not conducting a hearing on a habeas corpus petition raising the question of waiver of the right to object to a substitution of judges. *State* v. *Davis*, 564 S.W.2d 876 (Mo. Sup. Ct. 1978), discusses the state law governing the substitution of a judge prior to final arguments and instructions to the jury. In *United States* v. *Valante*, 264 U.S. 563 (1924), this Court expressly declined to hold that the substitution of a new trial judge before verdict violated the Constitution.

[4]A judge's absence for a brief period during trial when his presence was not actually needed has not been held to require the reversal of a

district or otherwise, a judge is unable to perform his

performed by Judge Duenas prior to the verdicts could have been performed as easily by the court clerk or bailiff. Following the verdicts, there were no post-trial motions to decide, and all that remained of a judicial character was the imposition of sentence.

Hence, in all material respects, this case resembles those in which the trial judge was substituted after verdict. It is well established that if, because of absence from the duties after a trial, a new judge may be assigned to the case, providing that the substituted judge acts with knowledge of relevant information. See *United States* v. *Bowser*, 497 F. 2d 1017, 1019 n.2a (4th Cir.), cert. denied, 419 U.S. 857 (1974); *United States* v. *Lewis*, 460 F. 2d 257, 258 (9th Cir. 1972); *United States* v. *Bakewell*, 430 F. 2d 721, 722 (5th Cir.), cert. denied, 400 U.S. 964 (1970); *Rogers* v. *United States*, 350 F. 2d 297, 298 (10th Cir. 1965); *Owens* v. *Hunter*, 169 F. 2d 971, 972 (10th Cir. 1948); cf. *Cahill* v. *Mayflower Bus Lines, Inc.*, 77 F. 2d 838, 839-840 (2d Cir.), cert. denied, 296 U.S. 629 (1935).

Rule 25(b), Fed. R. Crim. P., expressly permits such substitutions, which have been held to satisfy the requirements of the Due Process Clause. *United States* v. *McCallie*, 554 F. 2d 770, 773-774 (6th Cir. 1977); *Connelly* v. *United States*, 249 F. 2d 576, 580 (8th Cir. 1957), cert. denied, 356 U.S. 921 (1958). See also *Simons* v. *United States, supra*, 119 F. 2d at 544-545. The situation involved here—a visiting judge who found it necessary to leave the district—is one of the reasons that Rule 25(b) was

conviction. See, *e.g.*, *United States* v. *Pfingst*, 477 F. 2d 177, 195-197 (2d Cir.), cert. denied, 412 U.S. 941 (1973) (absence causing delay in answering jury's question); *Haith* v. *United States*, 342 F. 2d 158, 159 (3d Cir. 1965) (absence during jury voir dire); *Heflin* v. *United States*, 125 F. 2d 700 (5th Cir.), cert. denied, 316 U.S. 687 (1942) (absence during defense counsel's closing argument).

promulgated,[5] and petitioners do not suggest that Judge Duenas departed in any way from the procedures established by this rule.

In sum, the substitution of Judge Duenas for Judge Thompson during the jury's deliberations could not possibly have affected the verdicts. Cf. *Chapman* v. *California*, 386 U.S. 18 (1967). Petitioners have not indicated how they were prejudiced by these events. Even assuming that they are entitled to maintain this claim on appeal despite their failure to present a contemporaneous objection (see *Estelle* v. *Williams*, 425 U.S. 501, 512-513 (1976)), petitioners were not deprived of a fair trial. See *United States* v. *LaSorsa, supra*, 480 F. 2d at 531.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5]See 2 C. Wright, *Federal Practice and Procedure* §393 (1969); 8A *Moore's Federal Practice* para. 25.04[1] (2d ed. 1978).

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